No. 22202

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT E. LEUTHOLD, Superintendent of Banks, State of Montana, Helena, Montana, SECURITY BANK, and MINERS BANK OF MONTANA, N.A.,

Appellants,

v.

WILLIAM B. CAMP, Comptroller of the Currency,

Appellee,

THE FIRST NATIONAL BANK OF BUTTE and DALY NATIONAL BANK OF ANACONDA,

Appellee-Intervenors.

On Appeal from the United States District Court for the District of Montana

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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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AUTHORITIES CITED

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STATEMENT OF THE CASE

The National Association of Supervisors of State Banks (the Supervisors) is filing this brief as amicus curiae pursuant to the written consent of all parties to the case. This brief is limited to the question of the standing to sue of the Superintendent of Banks of the State of Montana.

The Supervisors adopt the statement of the case found in the brief of appellants and set forth here only such additional facts as are necessary to show the interest of the Supervisors in this proceeding.

The National Association of Supervisors of State Banks was founded in 1902 and has 52 members. It is composed of the officials of the state governments responsible for the supervision of state chartered banking institutions in every state in the Union and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands. As of June 30, 1967, there were 9,487 commercial and mutual savings banks chartered under state law subject to the Supervisors' jurisdiction with total resources of approximately $237 billion.

The Board of Directors of the Association, consisting of Supervisor members, is the governing body of the Association under its Articles, having authority to supervise its affairs and determine its policies.

State banks were invited to join the Association as "associate" members beginning in 1958. There are currently 4,434 such dues paying associate members. Representatives from the associate membership advise and assist the Board of Directors.

The present system of federally chartered or national banks was created by the National Bank Act of June 3, 1864, C. 106, 13 Stat. 99, Rev. Stat. 5133-5156 (1875), 12 U.S.C. §§ 21 *et seq.* The Comptroller of the Currency is authorized to charter and supervise national banks under the provisions of that Act. As of June 30, 1967, there were 4,780 national banks with total resources of approximately $243 billion.

State banks under state charters and national banks under federal charter together compromise the "dual banking system" of the United States which has been in existence for over 100 years.

The Supervisors have a vital interest in their standing to bring such actions as the one in the court below. They are charged with the administration of the banking laws of their respective states. Therefore, their right to challenge actions, such as that complained of in the court below, which in their opinion constitute violations of those banking laws, is of considerable importance in carrying out the duties of their offices. For the reasons hereinafter stated, the Supervisors believe that the court below was correct in upholding the standing of the Superintendent of Banks of the State of Montana to bring the action below.

SUMMARY OF ARGUMENT

The sections of the National Bank Act relevant to the branching of national banks refer to and incorporate state law as the standard for determining whether national banks may open and operate branches in a particular state. Similarly, the Bank Holding Company Act refers to state law by providing that an out-of-state bank holding company may only acquire the shares or assets of a state bank when this is specifically authorized by the state laws of the state in which such bank is located.

The Superintendent of Banks of Montana is charged with the supervision of banks in that state and with the execution of all laws in relation to banks. Section 5-602, Revised Codes of Montana (1947). He also may close any bank which has violated any law of the state. Section 5-1101, Revised Codes of Montana (1947). Since the substantive law of Montana is applicable to the matters at issue in this case, even though the banks in question are national banks, it follows that the Superintendent of Banks of Montana, who is charged with the administration and enforcement of the substantive banking laws of that state, has a substantial interest in being able to challenge actions, such as those complained of below, which constitute violations of Montana's banking laws.

The courts of appeals of two other circuits have upheld the standing of state bank supervisors to bring such suits. *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965); *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967). The only court holding to the contrary is that of the United States District Court in South Dakota and the conclusion of that court has been specifically rejected by both the Fifth Circuit and the District of Columbia Circuit Courts of Appeals. *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *affirmed in part*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

Not only the weight of authority, but the practical consideration of which persons would have an interest in enforcement of the state laws made applicable to national banks by the National Bank Act and the Bank Holding Company Act leads to the conclusion that the district court below was correct in upholding the standing of the Superintendent of Banks of Montana to bring this action. This result is also in accord with *First National Bank of Logan* v. *Walker Bank and Trust Company*, 385 U.S. 252 (1966), where the Supreme Court found that the purpose of Congress in enacting Section 36 of the National Bank Act was to insure competitive equality of national and state banks insofar as branch banking is concerned.

The only way in which such equality can be objectively assured is if the supervisors of banks in the various states have standing to seek compliance by national banks with the substantive state law to which they are subject. Otherwise, the only way competitive equality could be assured would be for the state supervisors to follow in all respects the interpretations which the Comptroller of the Currency or other federal officials may give from time to time to the branching and other applicable statutes of their states. This would not be in accord with the intent of Congress when it made state law the governing standard for national bank branching and prohibited out-of-state bank

holding companies from acquiring banks within a state unless specifically authorized by state law.

ARGUMENT

I. The Applicable Substantive Law To Be Applied in This Case Is That of Montana and, Therefore, the Superintendent of Banks of Montana Has Standing to Sue to Achieve Compliance with That Law.

Section 36(b) of the National Bank Act, 44 Stat. 1228, 12 U.S.C. 36(b), provides in relevant part as follows:

> "A national bank . . . resulting from the consolidation of a national bank . . . under whose charter the consolidation is effective with another bank . . . may retain and operate as a branch any office which immediately prior to such consolidation, was in operation as—
>
> "(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank . . ."

Subsection (c) referred to above specifically incorporates state law as the governing standard for the operation of branches. It provides:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> * * * *
>
> at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State or State banks."

Similarly, the Bank Holding Company Act, Section 3(d), 70 Stat. 134, 12 U.S.C. 1842(d), provides that the acquisition of shares or assets of a state bank by an out-of-state bank holding company must be specifically authorized by the state in which such bank is located by language to that effect and not merely by implication.

The interest of the state official charged with the supervision of banking in his particular state appears on the face of these statutory provisions, since state substantive law must be looked to in each instance to determine whether a branch may be established and whether an out-of-state bank holding company may make a bank acquisition.

Montana substantive law prohibits branches. Section 5-1028, Revised Codes of Montana (1947). Montana law further provides that upon consolidation the consolidated bank, if it meets certain qualifications, may retain and operate "offices" in the locations of the consolidating banks. Section 5-1124, Revised Codes of Montana (1947). There is probably no one more qualified to interpret and enforce these provisions of state law, which Congress has determined are applicable to the matter in controversy here, than the official charged with administering and enforcing them. If that official is denied standing to sue, the competitive equality which Congress sought to establish between state and national banks would be seriously threatened. *First National Bank of Logan* v. *Walker Bank and Trust Company, supra.* The courts of appeals which have considered this question in connection with the branching of national banks have uniformly come to the conclusion that state bank supervisors do have standing to sue.

While it could be argued that keeping national banks within the limits of the state laws applicable to them should be left solely to the federal officer charged with the supervision of national banks, the Comptroller of the Currency, such protection is patently insufficient to insure the "policy of equalization" decreed by Congress. First, the

Comptroller is concerned solely with the protection and supervision of the national banks. He has no inherent interest in insuring equality of opportunity for state banks. Therefore, he cannot be expected to dispassionately interpret and apply state laws to national banks. Secondly, the state is in the best position to interpret and apply its own laws. Finally, there may be instances where no state bank is affected immediately by the action of the national bank in violation of the state's laws or in which the state bank for any number of other reasons might not wish to challenge such violations. In such cases, the only party who could uphold the state's laws is the state itself. For all of these reasons, the Supervisors submit that as a practical matter the Superintendent of Banks of Montana must be held to have standing to sue in this instance where the state's interest is so clear and where Congress has been so careful to give controlling weight to it.

II. Where Congress Has Incorporated State Law as the Governing Standard the Weight of Authority Holds That State Banking Supervisors Have Standing to Sue.

Both the Fifth Circuit and the District of Columbia Circuit have now held that state bank supervisors have standing to challenge branching of national banks alleged to be in contravention of state branching laws.

In *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71 (5th Cir. 1965), the court upheld the right of the Superintendent of Banks of the State of Georgia to bring an action against a national bank on the grounds that it could not lawfully open a particular drive-in facility under the banking laws of Georgia. The Fifth Circuit specifically rejected the reasoning of the district court in the *South Dakota Case* concerning the standing of the state to bring such suits. The court noted that it was the substantive law of the state which was determinative of the issues before it and that in the absence of any contrary federal policies the remedial provisions of Georgia law should also be applicable. The court found that the state bank super-

visor was charged with the enforcement of the state's banking laws and was authorized thereunder to proceed against national banks as well as state banks for violation of those laws. The court held that since Section 36(c) of the National Bank Act adopts state law the application of that law would in no way interfere with the operation of national banks or conflict with federal authority and that "the subsumption of state substantive law as the regulating principle for national banking associations concerning branching carries with it the right of the State Superintendent of Banks to see to it that that substantive law is enforced."

The other court of appeals case upholding the standing of state bank supervisors to bring suits such as the one below is *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967). The District of Columbia Circuit first held that cases rejecting attempts by states or municipalities to intervene in law suits by virtue of their position as *parens patriae* were not in point for state bank supervisors have distinct legal rights of their own in their official station. The court then held that a state bank supervisor does have sufficient interest to bring an action to enjoin the Comptroller of the Currency from unlawfully authorizing a national bank to open a branch where state law would not permit branching by state banks. The court rejected the *South Dakota Case* reasoning and agreed with the *Jackson Case*, *supra.*

After deciding that a state bank supervisor had standing to sue in his own right, the court in *Nuesse* then dealt with his right to intervene in a suit brought by a state bank. The court's opinion on that issue points out with great force the state's interest in these matters. The court stated:

> "We not only have the greater impetus to intervention that inheres in administrative cases, but in addition the 'interest' of the state commissioner is underlined by the circumstance that the regulation of

> national banking is an area in which Congress, in the exercise of delegated federal power, has for various policy reasons decided to adopt and incorporate state law on issues of common concern. This admixture of national and state policies, attaching national legal force to the state policy, yields the corollary that a state official directly concerned in effectuating the state policy has an 'interest' in a legal controversy involving the Comptroller which concerns the nature and protection of the state policy."

The court found further support for the interest of the state bank supervisor in the recent decision of the Supreme Court in *First National Bank of Logan* v. *Walker Bank and Trust Company, supra,* and noted that:

> "Where Congress has been most deliberate in promoting a policy of equal opportunity by adopting state law on the subject, we think the courts may not be insensitive to the request by the official charged with administering the state's banking laws to appear as a party to urge the construction of the federal statute which he claims is necessary to secure the state's interests, and hence the congressional objectives."

Two Supreme Court cases decided prior to the adoption of Section 36(c) of the National Bank Act also support the standing of the Superintendent of Banks to sue below. In *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1924), the Court upheld the authority of a state's attorney general to bring a *quo warranto* proceeding in the state supreme court to determine the authority of a national bank to establish and conduct a branch bank in St. Louis. The reasoning of the dissent in the *St. Louis Case* even supports the standing to sue of the supervisor in the present case. The dissent argued that only if the United States had adopted state law, as Congress subsequently did in Section 36(c), would the state have an interest sufficient to maintain the action.

Similarly, in *First National Bank of Bay City* v. *Fellows,* 244 U.S. 416 (1917), the court upheld the standing

of the Michigan attorney general to challenge a national bank's exercise of trustee powers. The federal act there permitted the Federal Reserve Board to allow national banks, "when not in contravention of state or local law", to act as trustees.

The reasoning that supports the standing of the Montana Superintendent to sue pursuant to Section 36(c) of the National Bank Act also supports his standing to enjoin violations of the Bank Holding Company Act, Section 3(d), 70 Stat. 134, 12 U.S.C. 1842(d) for that section permits the acquisition of the assets or shares of a state bank by an out-of-state bank holding company only when that is "specifically authorized by the statute laws of the State in which such bank is located".

As *Nuesse*, *supra*, makes clear when Congress has decided to adopt and incorporate state law on issues of common concern the interest of the state official charged with enforcing those laws is sufficient to bring suit. The Supreme Court's recent decision in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129, 135 (1967), also demonstrates that the Montana Superintendent had standing to sue to restrain an alleged violation of 12 U.S.C. 1842(d). There the Court ruled that the State of California was entitled to intervene as of right in a proceeding when "protection of California interests in a competitive system was at the heart of our mandate directing divestiture."

See also *First National Bank of Bay City* v. *Fellows*, 244 U.S. at 427-428, where the federal act permitted the Federal Reserve Board to allow national banks, "when not in contravention of state or local law" to act as trustees, etc. Whereas in *Fellows* the national bank could act in certain capacities only when not in contravention of state laws, in the present case out-of-state bank holding companies can acquire banks within a state only when permitted by state law. The phraseology may be different, but the principle is the same. The incorporation of

state law gives the state superintendent standing to sue under the Bank Holding Company Act, particularly where as here the holding company facade was used to evade and avoid the state's laws on bank branching.

The state superintendent was not precluded from bringing the action below by Section 9 of the Bank Holding Company Act, 70 Stat. 138, 12 U.S.C. 1848, since the method of review in the courts of appeals provided by that section is only applicable to review of orders of the Federal Reserve Board. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965). That Board held no hearing and issued no order in this case since the defendants claimed they were acting pursuant to provisions of the Bank Holding Company Act which exempted them from the requirement of obtaining Board approval. The Superintendent below was challenging action of the Comptroller and not of the Federal Reserve Board.

Similarly, the claim that the only remedy for violations of the Bank Holding Company Act is criminal in nature and, therefore, the Superintendent lacked standing to bring a civil suit is in error. The Superintendent was seeking review of action taken under color of approval of the Comptroller. In other words, the Superintendent was seeking review of the Comptroller's action and was not seeking to enforce any penalty against the banks involved. As shown by the fact that the Justice Department is acting as the Comptroller's attorney in this case, it woud be futile to remit parties to sole reliance for relief upon the hope that the Justice Department would bring a criminal action against the banks involved. Thus, the only effective review mechanism for the Superintendent to challenge action of the Comptroller in alleged violation of the Bank Holding Company Act was in the district court below.

Intervenor-Appellees rely *solely* on the case of *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *affirmed in part*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965), to support

their argument that the Superintendent of Banks of Montana lacks standing to sue. The court of appeals in the *South Dakota Case*, however, held that the question whether the state had standing to enjoin the operation of the branch banks there had become moot because by the time of the appeal the Supreme Court of South Dakota had held invalid the banking commissioner's anti-branching rule under which it was claimed the branches were illegal. To the extent that the court of appeals held that the state lacked standing under the Bank Holding Company Act, 12 U.S.C. 1842(d), its reasoning should be rejected for the reasons previously discussed.

The South Dakota district court opinion relied upon the decision in *Millard* v. *National Bank of Detroit*, 338 Mich. 610, 61 N.W.2d 804 (Sup. Ct. of Mich. 1953), but the holding in that case was not that state bank supervisors do not have standing to bring suits such as that below. The *Millard Case* was concerned with the jurisdiction of a state court to hear the case and not with the standing of a state to bring suit in a federal court. Also, *Kerfoot* v. *Farmers & Merchants Bank*, 218 U.S. 281 (1910), relied upon by the South Dakota court, had no relevance to the point before the court since no application of state law was involved in that case. There it was alleged that the national bank was acting beyond its charter powers. No allegation was made that the national bank was acting contrary to applicable state law. *Kerfoot* held that only the sovereign can object if a corporation exceeds its charter powers. Thus, the *South Dakota* decision diverges from the mainstream of decisions on the question of supervisors' standing to enforce state branching laws against national banks.

Similarly, the unreported opinion in *Merchants & Miners Bank* v. *Saxon*, Civil Action No. 1042, W.D. Mich., June 7, 1966, is not in point and was not followed in *Nuesse*, *supra*. That opinion was concerned with the right of the Commissioner of Banking of the State of Michigan

to intervene in a case involving the right of a national bank to move its charter and main office from one location to another under Section 30 of the National Bank Act, 73 Stat. 457, 12 U.S.C. 30. The national bank had also filed an application to open a branch at the location of its old main office. The court held that the state had no interest in the interpretation of Section 30 which vested entire discretion as to whether a bank can move its location in the Comptroller of the Currency and made no reference to any state statute. The court found that although Section 36 (c) did refer to state law it was not presently involved in the case. The court said, "The interest of the state comes in only if, at the same time, the said defendant is permitted to open a branch bank in Lake Linden." The court thus implied that if Section 36(c) had been directly involved the state bank supervisor would have had an interest in the proceeding.

CONCLUSION

For the reasons stated, the district court was correct in holding that the Superintendent of Banks of Montana had standing to bring the action below.

Respectfully submitted,

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CERTIFICATE

CALVIN DAVISON, one of counsel for Amicus Curiae, states as follows:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

CALVIN DAVISON
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that this Brief for Amicus Curiae has been served by mailing three copies thereof to each of the following counsel of record in this cause: Moody L. Brickett, United States Attorney for the District of Montana, Federal Building, Butte, Montana 59701 and Stephen R. Felson, United States Department of Justice, Appellate Section, Civil Division, Washington, D.C., Attorneys for Appellee; and to McKeon and Brolin 122-126 Oak Street, Anaconda, Montana 59711, Johnson & Johnson, 1st National Bank Building, Butte, Montana 59701, and John D. French, 1260 Northwestern Bank Building, Minneapolis, Minnesota 55402, Attorneys for Intervenor-Appellees; and to Donald A. Garrity, Assistant Attorney General, State of Montana, Mitchell Building, Helena, Montana 59601, Weber, Bosch & Kuhr, Citizens Bank Building, Havre, Montana 59501, and Hutton, Schiltz & Sheehy, 403 Electric Building, Billings, Montana 59101, Attorneys for Appellants.

Dated April 3, 1968.

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